United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2548

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

JOHN R. PATTERSON, et al.,

Plaintiffs-Appellees,

- against -

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants-Appellees,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiffs-Appellees,

- against -

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants-Appellees,

DOMINICK VENTRE, FRANK CHILLEMI, GERALD KATZ, et al.,

Intervenors

JAMES V. LARKIN,

Intervenor-Appellant

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT:

This is an appeal from an unreported opinion and order of the Honorable Lawrence W. Pierce dated September 19, 1974 (hereinafter referred to as Op.), approving a settlement agreement entered into by and between the minority employees, the government, the publishers and the Newspaper and Mail Deliverers' Union of New York, (hereinafter referred to as the "agreement").

ISSUES PRESENTED FOR REVIEW

1. Are equally suffering white employees entitled to the same relief afforded minority employees?

2. May an affirmative action quota/goal be established without authoratative evidence of labor force statistics?

3. May a law suit be settled without the agreement of all the litigants?

STATEMENT OF THE CASE

This case presented for review stems out of two separate actions predicated upon Title VII of the Civil Rights Act (42 U.S.C. Sec. 2000(e)). The first action was brought by a minority employee and the second by the Equal Employment Opportunity Commission. Both actions were consolidated for all purposes. In each the Newspaper and Mail Deliverers' Union of New York and Vicinity was charged with acts of nepotism. Shortly before the conclusion of a trial, the plaintiffs and defendants entered

into a settlement agreement dated June 27, 1974. Two parties to the law suit, the intervenors, did not participate in the negotiations which resulted in the agreement nor did they wish to accept its terms. Nevertheless, after a hearing in an opinion dated September 19, 1974, the Honorable Lawrence W. Pierce approved the settlement agreement, and its provisions became effective on November 11, 1974.

The union is the exclusive bargaining agent for various newspaper publishers' delivery departments. Its geographic area approximates a fifty (50) mile radius from Columbus Circle in New York City.

The newspaper industry employs a nominal number of full time personnel (regular situation holders). As daily needs are indicated, additional regular employees are hired from a priority list. The two major publishers, the New York Times and the New York Daily News utilize four separate priority lists in accordance with a contract negotiated with the union (hereinafter referred to as the "contract").

The settlement agreement establishes a goal of twenty-five (25%) percent minority employment. New employees will be hired at a ratio of three (3) minority individuals for every two (2) non-minority individuals.

The provisions of the settlement agreement call for the bumping of incumbent non-union, non-minority employees by minority employees on a daily and long range basis. The Court elected to disregard the seniority system so far as it affected these individuals. Nevertheless the Court below in approving the settlement agreement noted that these non-union workers had also suffered the effects of nepotism.

James Larkin has been permitted to appeal in forma pauperis pursuant to an order of the Honorable Lawrence W. Pierce.

ARGUMENT:

Having found that both black and white employees suffered the effects of the union's nepotistic policy, the District Court, a Court of Equity, should grant equal relief to those employees.

The attempts by the various parties to circumvent due process of law by settling the action without the consent of all the parties was prejudicial to the rights of the non-minority, non-union employees.

POINT I:

"Black and white together, we shall overcome."

In the newspaper industry members of the Group III list hired to deliver the newspapers, have been striving to rid the system of inequities. They have, over the years, worked together to secure equal opportunity for all.

The hallmark of their existence as a group has been equality. Group III men have fought various union practices which were expressly directed against them as a group. List III men have fought the indifference of a pacifistic, acquiescent management. List III men have fought the nepotistic desires of union members who, historically, have wanted work opportunities for their own offspring.

These fights have always been made by the men as a collective body. There has been no racial, ethnic or religious divisions during the course of these efforts. In fact, at trial, the testimony in support of the government and minority employees' position that the contract systematically excluded all individuals from Group III from ever obtaining regular situations in the industry was primarily proven by white employees. For more than a decade, these men and others before them have done everything humanly possible to redress the wrongs of this industry. The Court below

acknowledged this fact when it stated:

> "The facts selected by the intervenors in support of their objections are so. And, at first glance their frustration and anger with this settlement agreement is understandable, and their solution is appealing. These intervenors from Group III, as individuals, have also suffered the effects of the union's nepotism; they have also attacked the present practices and abuses in other forums, under different statutes. Certainly this Court does not accept the argument that these particular men have benefited from a discriminatory system." (Op. 18). (Emphasis added)

At trial, it was conceded by virtually every witness, black or white, that all List III employees were treated identically. (e.g. Tr. 1014, 1934).

The District Court held that:

> "It is abundantly clear that the nepotistic policy of the union prior to 1952 resulted in discrimination against minorities." (Op. 12).

Nepotism therefore was the "act" of discrimination which prohibited minority employees from obtaining their rightful place. Similarly as noted above, the white employees suffered the identical effects of "nepotism"; however since these employees were white the Court refused to designate the act of nepotism as "discrimination".

Therefore, although the white and minority employees on the Group III list have equally suffered, the Court refused to grant them equal relief.

The District Court concluded that the settlement agreement entered into between the government, newspaper employers and the union should be approved even though it discriminated against non-union white employees, since those employees were (a) somewhat

better off than they had been prior to the agreement, (b) had no seniority rights in any event, and (c) could not benefit from the Court's decision since they were not minority individuals. (Op. 18-23)

It is respectfully submitted that the conclusions of the District Court are contrary to the present state of the law.

From the outset it must be noted that the List III white non-union employees have only sought to obtain relief equal to that afforded the minority non-union List III employees. The District Court concluded however that:

> "...it must not be forgotten that this is a Title VII case. ...Title VII is an expression of a commitment to correct minority employment discrimination and, hopefully, the vast social consequences that flow from it and afflict the whole of the nation. The statute does not undertake to correct all forms of employment discrimination. Thus to the extent that what the intervenors seek here is relief equal to that afforded minorities, it has no legal foundation in this case. Under the law, relief here must be limited to victims of the kinds of discrimination prohibited by Title VII." (Op. 22-23).

In sum the District Court concluded that as a matter of law a Court of Equity could not grant equal relief to individuals who had equally suffered.

Other Courts have considered this issue and have ruled differently.

In a case directly analagous to the instant matter, U.S. v. Roadway Express, Inc., 457 F . 2d 854 (6th Cir. 1972), the Circuit Court awarded equal treatment to both black and white individuals even though it was a discrimination action predicated upon Title VII.

In Roadway, the discriminated employees were given industry wide seniority credit and allowed to transfer to so-called "white" departments.

> "...no charge of inequity will lie against the provisions of the consent decree ordering the transfer of city drivers, both black and white, and granting seniority to them as of January 18, 1968, the date they would have been transferred but for the discrimination..." (Id. at p. 856).

Furthermore in Roadway, the suit was brought by white employess in the so-called "white" departments. They were challenging the transfer rights and seniority provisions that were being accorded to other white employees who,as a by-product of the discrimination against black employees,were also prohibited from transferring. The Court stated:

> "In seeking to deny such seniority to the transferred white city drivers the appellant overlooked the corrollary facts that the white city drivers were equally the victims of discrimination, since their transfer was prevented as a necessary part of the refusal to permit black city drivers to transfer to over-the-road jobs." (Ibid at p. 857)

Similarly in the instant case, the"act" of discrimination (nepotism) directly prohibited the white employees from obtaining their rightful place.

The District Court as a Court of Equity should have been guided by the maxim that "Equality is Equity" (Pomeroy Eq. Jur. Section 405).

POINT II:

Although the Court below concluded that the non-minority List III employees "applauded" the agreement,this simply is not the case. Larkin was never included in the discussions which resulted in a typed,printed,multi-page proposed settlement agreement (in fact the government was not a party to those negotiations either). Larkin has never accepted as sound any provisions which required super-seniority or bumping of non-minority employees by minority members who either are presently employed or would be newly admitted into the work force of this industry. In a brief submitted in opposition to a motion seeking approval of the settlement agreement, Larkin stated:

> "In light of the unified history of Group III men why are the intervenors forced to oppose the approval of this settlement agreement? Surely this agreement has much to comend it. However, the very heart of the"agreement advancement" provisions flies in the face of both human decency and the law. Specifically:

PAGE NO.	PARAGRAPH NO.	
4	7	Established a 'goal' of 25% minority and defines minority as Black, Spanish surnamed, Oriental and American Indian. The goal is for the jurisdiction of the union and employment refers to Group I or regular situation status.
5	9(a)	All minority employees go immediately to the I list jumping over senior non-minority Group III men (at the News an equal number of non-minority individuals will also go to the Group I List in accordance with seniority).

PAGE NO.	PARAGRAPH NO.	
5	14	Although out of context paragraph 14 is directly related to this provision and it requires that the spot vacated by the minority employees who are placed on the I List shall be filled by new individuals who have never been on the III List.
6	9(b)	Gives preferential treatment to certain named individuals - 3 minorities and 1 white.
8	10(d)	Has a new work requirement totally unrelated to minority advancement. Can the failure to earn 120 days in 1974 be considered a part of minority advancement?
9	11	I List vacancies are filled alternatively by 1 minority individual regardless of seniority and 1 non-minority individual in accordance with seniority.
10	12	The specific provisions affecting the News are identical in principle with those of paragraph 11.
11	13	New recruitment of Group III men is on a 3 to 2 basis.
13	17	Fails to limit Group II hiring.
15	18(b)	Lay-offs - protects union men regardless of seniority in the industry and for the first ten lay-offs requires minority advancement from the III List regardless of seniority.
22	36	Gives minorities credit for pension plan, etc.
23	37	Awards back-pay to minorities.
28	42	Res judicata only applies to the plaintiffs.

(Larkin memorandum of law in opposition to the settlement agreement of June 27, 1974).

Essentially Group III men oppose preferential use of benefits and quotas for minorities. The beneficiaries of this agreement, minorities, will be given super-seniority. In order to comply with the provisions of this agreement the publisher will have to offer Group I employment to hundreds of individuals who are not presently in the industry before they can offer the same status to an incumbent Group III man. This point was accepted and acknowledged by the District Court in its opinion. (Op. 17-21).

Let us take the example of the 175th employee on a Group III List of the Daily News. (Assume for purposes of argument that he is white). A projection of his work opportunities are as follows:

1. Before he will be eligible there must be 340 vacancies on the I List. Of that number approximately 170 vacancies would have been filled by minority individuals who as of the date of the settlement were not employeed in the industry.
2. He will not be eligible for the I List during the next five (5) years.
3. Daily hiring will go to those individuals who have passed him (170) as well as other minorities (past employees) who are regular job holders at various publishers and now have assumed the infamous List II employment eligibility status.

4. The probability of his making the newly formulated 120-day work requirement is nil.

5. In the event of a lay-off in the industry individuals with significantly less industry-wide seniority will be given the right to work ahead of him.

How absurd! Under the terms of the agreement a new minority employee who has achieved Group I or regular situation status at a publisher would be able to shape at the News/Times ahead of the incumbent Group III employee. The minority employee would now utilize the privileges of Group II hiring. The system remains intact - "...new wine in old bottles." (9 Matthew verse 17).

Perhaps most onerous are those provisions of the agreement which permit one individual to bump, leap-frog, jump (call it what you will) over another. Certainly it is made all the more repulsive when you consider the fact that only the Group III employees will suffer under this extraordinary "super seniority" system. Under the proposed settlement no union man,(i.e. Group I employee or regular situation holder) will be bumped by an individual who is not presently in the industry. Those who have benefited from the discriminatory act - nepotism, will continue to reap the benefits of their discrimination.

No Court has ever countenanced any plan which required this kind of procedure. (e.g. Franks v. Boman Transportation Co., 495 F. 2d 398 (5th Cir. 1974).

The provisions of the agreement calling for back pay and pension benefits to a select group of minority III List employees also is unjust. Given the history of this industry, is it fair or legal to arbitrarily grant one of the Group III employees compensation or pension privileges and not grant it to another?

The agreement speaks to the question of res judicata and collateral estoppel (agreement page 28). However these legal rules are binding only on the plaintiffs. Under present case law serious questions could be raised concerning the utilization of previous testimony in future proceedings involving Group III employees and the defendants herein.

A review of the settlement agreement indicates that the only employment consequence suffered by a union man is the loss of his right to voluntary transfer. A man who has a full time job at one shop will no longer be allowed to voluntarily transfer from that position to another publisher. Of course, he will continue to be employed at his original position and he will never be bumped or passed over by any minority individual. If he were to actually lose his job due to a legitimate economic reason he would be permitted to transfer. Considering the fact that the union members are the men who have benefited as a result of the discriminatory practices, one questions just what is it that they are being asked to give up as payment for their discrimination.

It is the non-union white Group III employee who once again is being sacrificed.

Perhaps at this point a brief discussion of the nature of employment in this industry would be instructive. During the course of the proceedings below all parties recognized that Group III is the initial point of entry for anyone seriously concerned about finding full time employment in the industry.

Despite the overwhelming proof offered during the course of the trial that the III List employee was a full time regular worker for the publisher (Tr. 28, 112, 641, 2334) the District Court concluded:

> "The fact remains that Group III workers do not have full time employment, nor do many of them have any great expectations or intention of working full time or they shape from their Group III List. They are shapers." (Op. p. 20)

This conclusion is contrary to the weight of the evidence. A review of the record below indicates that a majority of the workers in the industry are "shapers" both union and non-union individuals. In order to maintain their seniority at a given employer, a Group III employee must appear at the plant, ready, willing and able to work at least six (6) times a week (contract 4-A.2.(e)). This number of appearances may be reduced by one (1) if he actually works five (5) days. (contract 4-A.2.(e)). How could the Court conclude that this is a part-time job? The Daily News acknowledges that a List III employee could earn upwards of $15,000 per year.

This incredible burden of shaping six (6) days or working five (5) has been rigorously enforced by the employers. Absent a valid excuse, failure to meet the requirement resulted in de-listing of an employee.

The contract does have provisions for casual or part-time employees - the IV List. These men need only appear three (3) times a week in order to maintain their seniority (con. 4-A.2.(b)(e)).

Although the record amply supports the argument that List III men are full time employees, it is quite obvious that a number of the men faced with the real problem of job security had elected to find alternative employment. For example, the highest ranked minority employee at the News was a full-time postal employee.

For reasons best known to the parties, the union, government, minorities and publishers decided that the I List was to be considered "employment" in the industry. Does the I List offer employees a regular full-time job? No. Are I List employees required to shape six (6) days or work five (5)? Yes. Do I List employees have to shape each day? Yes.

For all practical purposes work requirements for the Group III List and the Group I ist are identical under the contract. (Naturally, the Group I List has priority on a daily hiring basis over the II List). Both the Group I List and the Group III List are designated as "extras" in the contract. Both have the identical work/shape requirements. A I List employee as well as

a III List employee must work five (5) days or shape six (6) times in order to maintain his seniority rights. Both must sign a daily shape sheet at every shape that they attend. Finally, when a vacancy occurs within the regular situation category it is filled by seniority from the I List and if exhausted, the III List.

However, since the Group I List does not suffer the consequences of Group II hiring, a Group I employee's chances of receiving work on any given day are considerably greater than that of a Group III employee. Furthermore, if an individual is transferred from one publisher to another,he is placed at the bottom of the Group I List regardless of industry seniority.

POINT III:

Notwithstanding the prohibitions contained in Title VII, Courts have interpreted the language in such a way as to allow the imposition of "goals" or quotas in behalf of minorities. The rationale being past discrimination must be eradicated by affirmative action.

Although Larkin does not accept or approve of these rulings, he is not unaware of their existence. The issue therefore encompasses the nature and quality of these approved goals. Primarily they are aimed at eliminating a statistical inbalance which has occurred as a result of discrimination.

There has never been a case whereby a new minority employee has been permitted to leapfrog jump, bump, or enjoy "super" seniority over an incumbent white employee. Even in those cases which were concerned with blatant acts of discrimination no minority employee, incumbent or new has ever been permitted to enjoy "super" seniority or otherwise leapfrog over a white employee.

The law reads:

> "42 U.S.C. 2000e-2(a). It shall be unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;..."
>
> "42 U.S.C. 2000e-2(j). Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or

> joint labor management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any employer,..."

The legislative history of the Act is voluminous. It is submitted that the foregoing excerpts from the Congressional Record reflect the legislative intent concerning quotas and preferences, etc.

The Department of Justice stated its views as to the effect of Title VII on seniority rights in a memorandum of the Attorney General which Senator Clark (D.-Pa.) read into the Congressional Record:

> "First it has been asserted that Title VII would undermine vested rights of seniority. This is not correct... Employers and labor organizations would simply be under a duty not to discriminate against negroes because of their race. Any difference in treatment based on established seniority rights would not be based on race and would not be forbidden by the Title." (110 Cong. Rec. 7207 (1964)).

In an interpretive memorandum submitted by Senator Clark and Case (R.-N.J.), co-floor managers of the Civil Rights Bill in the Senate, it was noted that:

> "Title VII would have no effect on established seniority rights. Its effect is perspective and not retrospective. Thus for example, if a business has been discriminating in the past and as a result has an all white working force, when the Title comes into effect the employers obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged - or indeed - permitted - to fire whites in order to hire negroes, or to prefer negroes for future vacancies, or once negroes are

hired, to give them special seniority rights at the expense of the white workers hired earlier." (110 Cong. Rec. 7213 (1964)).

In the case at bar we do not have a history of blatant racially discriminatory acts. Rather,the trial record demonstrates that improper nepotistic practices coupled with questionable certifications and transfers of regular situation holders (whites and blacks) to the News or Times resulted in the continued replenishment of the Group I List. For more than a decade these actions have frustrated and prevented any Group III employee - black or white - from obtaining a regular situation at the News or the Times.

The legislative intent is well defined. An incumbent employee should not lose his job as a result of a preferential affirmative action program. Here, there is no definitive act of racial discrimination other than the actions of the union in its practicing of nepotism. Yet, if the settlement agreement is approved, the white members of the Group III List who have equally suffered the effects of nepotism will lose their seniority rights.

A review of the many Title VII cases indicates that employment discrimination can be broken down into four (4) categories.

1. Discriminatory non-job related tests.
2. Segregated seniority lines creating a caste system.
3. Union hall job referral systems.
4. Intentional acts of discrimination in hiring and promoting.

The instant case does not conveniently fit into any of these categories. The union's discriminatory conduct was clearly aimed at anyone on the Group III List. This is not a classic case of segregated seniority lines. Nor can you find a union hall job referral system, discriminatory test program, or intentional act of racial discrimination with respect to hiring and promotion. The simple truth is that the discrimination is "genetic". As a rule if you did not have the genes of a union member you simply did not enjoy the benefits of unionization.

The following colloquy between the Court, an attorney, and the President of the Union is illuminating:

> "THE COURT: Why have the card?
>
> "THE WITNESS: Well to a lot of fathers, they think it's very important to see their sons get a card. It's - this is going back - we have grandsons in this business and their grandfathers just retired are still actively working.
>
> "It is a traditional thing, that we have a union that's been in business since 1901. And it's been a very tight-knit organization for all these years and steeps in a lot of tradition, and there are a lot of fathers. As I said before, when their son is born, they put in the application for his union card.
>
> "THE COURT: Why should the widow of a deceased member be concerned whether her son or brother-in-law has a card? What difference will it make in her life?"

"THE WITNESS: Well in the case of a hardship card we try to provide work where we can. There are shops where there is no physical shape. There are small shops where if a fellow has a father and son card and he is shaping someplace, the end of a list, and in a five man shop, for arguments sake, somebody passes away, now, when a brother member who has a particular need and particularly in a hardship case where the widow of a member has a need, we deem it our responsibility to try to provide work and we will then refer him to this particular shop and he may walk right into a job. This is an advantage that he has as a member of the union, and we don't believe that it is an unfair advantage."

"I might add that we do this without regard to any race, color or whatever."

"Q. As long as the man is a union member? In other words, it is not done on a racial basis, it's done on a membership versus non-membership basis?"

"A. I would be the first to admit that we favor and we are partial to our members and I'm not ashamed of that." (Tr. 321, 322).

There has been no definitive ruling by the United States Supreme Court on the questions surrounding the imposition of quotas or goals in a Title VII case. Therefore, we look to the decisions of this Court for guidance.

It is respectfully submitted that a review of these decisions will firmly establish the principle that quotas/goals may only be used to a very limited extent and that in no case may an individual enjoy "super" seniority or leapfrogging advantages over another. Particularly in a case where both black and white employees have suffered equally.

In a recent decision, Rios v. Enterprise Association Steamfitters Local 638 of U.A., decided June 24, 1974, the Second Circuit was confronted:

> "...with questions arising out of the imposition of a specific racial membership goal upon a union as a means of dissipating the effects of its past discrimination against minority applicants for membership." (Slip Opinion p.4370).

Unlike the instant case, in Rios, no white individual claimed to have been similarly discriminated against by the union. Furthermore, in Rios the District Court entered a judgment finding discriminatory acts on the part of the Steamfitters Union. This finding of discrimination went far beyond a mere statistical imbalance.

The Circuit Court noted:

> "The Court's findings, which are not controverted, disclose a pattern of long-continued and egregious racial discrimination which permeated the Steamfitting industry, precluding qualified non-white applicants from gaining membership in the union's A branch and maintaining it as a "white" union. ...Under the circumstances the imposition of remedial goals was not an abuse of discretion." (Rios v. Enterprise Association Steamfitters Local 638 of U.A., Slip Op. P. 4385).

In support of its decision approving "goals" the Court cites three recent Second Circuit (these cases will be discussed below) and eight additional Circuit Court cases which have approved the use of "goals" for the purpose of remedying the effects of past discrimination.

It is noteworthy that in each and every one of these cases cited in Rios the approved "goals" were limited and any attempt to leapfrog a minority employee over a white employee was firmly rejected.

In Rios the Court cautions that when affirmative action is indicated the scope of the relief should be individually tailored.

In light of the holding below that both black and white employees have suffered equally, can one reasonably or morally conclude that there was discrimination directed solely at black employees? Is the imposition of a "goal" or preference warranted? It is respectfully submitted that this Court should not permit any minority employee to bump or enjoy "super" seniority over an incumbent Group III white employee who has equally suffered the serious effects of nepotism.

Bridgeport Guardians Inc. v. Members of Bridgeport Civil Service Commission, 482 F. 2d, 1333, (2d Cir. 1973) supports Larkin's position. Although the Court authorizes quotas to cure past discrimination, it reversed those provisions of the District Court's order which would have allowed bumping of incumbents. (Bridgeport was concerned with police department recruiting and testing procedures.)

> "We are constrained however to find that the imposition of quotas above the rank of patrolman constitutes an abuse of discretion and is clearly erroneous. Initially, we observe that there has been no finding

> that the promotion examination is not job related. While past exclusionary hiring examinations do justify the quota remedy on entrance, there is no justification in our view for extending the remedy to higher ranks. We are discussing some 117 positions with time-in-grade requirements mandating three years service as patrolman, sergeant and lieutenant postponing promotion to captain for a minimum of nine years. While this factor will delay those of the minority groups who will become patrolmen, the imposition of quotas will obviously discriminate against those whites who have embarked on a police career with the expectation of advancement only to be now thwarted because of their color alone. The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish racial attitudes. See Vulcan Society v. Civil Service Comm. - N. 360 S. Supp. 1265, 1277 - 1278 (S.D.N.Y. 1973); Kaplan, Equal Justice in an Unequal World: Equality for the Negro - The Problem of Special Treatment, N.W.U.L. Rev. 363, 375-80 1966. Police morale is a proper concern as the welfare of the whole community is to be considered. We see no purpose in curing a past mischief by imposing a new one which is deliberately tainted. We strike from the judgment below therefore all quota requirements above the rank of patrolman. ..." (482 F. 2d at 1341).

In Vulcan Society of New York City Fire Department, Inc. v. Civil Service Commission, 490 F. 2d 387 (2d Cir. 1973), the Court, having found a discriminatory testing program, allowed limited quotas for new employees and noted:

> "As in Bridgeport Guardians, supra, 482 F. 2d at 1340, we approach the use of a quota system 'somewhat gingerly' and approve this course because no other method was available for affording appropriate relief without impairing essential city services." (490 F. 2d at page 398)

The Second Circuit in U.S. v. Wood, Wire and Metal Lathers International Union, Local Union No. 46, 471 F. 2d 408 (2d Cir.) Cert. denied, 412 U.S. 939 (1973) noted that there was a finding in the District Court of a "stark pattern of racial

discrimination...". Indeed, "there is no lack of evidence of past discrimination... Appellants themselves acknowledged the fact of past discrimination..." The Court approved the issuance of new permits to minority individuals as well as to white individuals. However, even with this history of discrimination the Court noted:

> "Admittedly requiring that the union issue a certain minimum number of permits is a sweeping use of the Court's broad power under the act; it is compelled, however by Local 46's actions in this case. ... subject to review and revision in light of the changed circumstances, the requirement presents little danger of layoffs or other adverse affects on the ability of those already holding permits. The right of the union to protect incumbent workers, was recognized and made central to the administrator's proposal. See Griggs v. Duke Power Company, 401 U.S. 424 (1971); U.S. v. Jacksonville Terminal Company, 451 F. 2d 418 (5th Cir. 1971), Cert. denied, 406 U.S. 906 (1972). The 250 permits provided for represent only anticipated new job openings." 471 F. 2d 408.

In a landmark decision U.S. v. Bethleham Steel Corp., 446 F. 2d 652 (2d Cir. 1971), the defendants prior to trial admitted having practiced discriminatory acts. The nature of the discrimination was appalling. Almost every conceivable type of discriminatory conduct had been in effect (see U.S. v. Bethlehem Steel Corp., Record on Appeal, Appendix, Volume I, Stipulation of Facts). At trial, the only remaining issues concerned seniority rights and pay scale rate retention.

Blacks had been forced into eleven distinct departments (segretated seniority systems) within the company. Bethlehem and the union contended that it would be improper to allow a black man to transfer from one of the segregated departments to a "white" department while retaining certain economic and seniority rights. The Court rejected the argument since it would have placed a minority employee who wished to elect a transfer in an economically impossible position.

In a thorough analysis of the various problems concerning the affirmative action program,the Court concluded that,even though there had been gross discrimination there should be no adverse effects (bumping, leapfrogging, "super" seniority systems, etc.), suffered by incumbent white employees as a result of the litigation. This is precisely the issue that is at the heart of the instant case with one very important exception. In this case the only ones who will suffer the effects of the affirmative action program (bumping, etc.) are the white non-union employees who have been the victims and have suffered the effects of the union's nepotistic policies throughout the years.

Although there has been no definitive ruling by the United States Supreme Court concerning employment goals/quotas, it is respectfully submitted that the following cases should be considered.

The sum of the matter is that racial classification is an "invidious discrimination forbidden by the Equal Protection Clause" (McLoughlin v. Florida, 379 U.S. 184, 193). The guarantee of the "equal protection of the law" cannot be squared with a system that deprives members of one race of their rights in order to provide "recompense" to members of another. A quota necessarily legislates not equality but a rule of racial differences without regard to an individual's attributes or seniority rights. Racial classifications are "constitutionally suspect" (Bolling v. Sharpe, 247 U.S. 497, 4999).

Racial classifications are at once vague and dangerous. For example, the Nazis defined as Jewish any person who had one quarter or more Jewish blood. (Raul Hilberg, The Destruction of the European Jews, P. 48, Quadrangle Paperback Edition, 1957; First Regulation to the Reich Citizenship Law, November 14, 1935) and in this country's own history of miscegenation laws the negro has been variously defined as ranging from "1/8th or more of African or negro blood" to any "ascertainable amount of negro blood". The American Indian was not considered a colored person in Virginia if he had only 1/16th or less of American Indian blood (Levin v. Virginia, 388 U.S. 1, 5 fn 4 (1967); McLoughlin v. Florida, supra, fn 6 (1964).

In the instant case the record is clear that race per se was not the single distinguishing factor which prohibited the advancement of individuals. The process of advancement did not involve

automatic acceptance or rejection of individuals solely based on race. Perhaps now more than ever the notions of Mr. Justice Harland in his dissent in Plessy v. Ferguson, 163 U.S. 537, 559 (1896) are appropriate:

> "But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens."

The greatness of America stems from the idea of equal protection of the laws for every person on an individual basis and not on the basis of quotas, goals or other such objectives for any particular group. Injustice can never be remedied by injustice.

> "American progress in its attempt to eradicate racial discrimination is due largely to the generally held belief that individuals, regardless of their race, creed, religion, sex or national origin, should be accorded an equal chance to compete for the opportunities society provides - employment - education - and others - on the basis of individual ability. In our democracy rights are accorded primarily to individuals, as distinguished from groups. Opening the doors long shut to minorities is imperative, but in so doing, we must be careful not to close them in the face of others, lest we abandon the basic principles of non-discrimination that sparked the effort to pry open those doors in the first place." (Commonwealth of Pennsylvania v. O'Neill, 473 F. 2d 1029 (3rd Cir. 1973).

In construing Title VII of the Civil Rights Act of 1964 the Supreme Court in Griggs v. Duke Power Company, 401 U.S. 424 (1971) held that job classification standards must be performance related. The Court in a unanimous decision (Mr. Justice Brennan not participating) said:

> "Congress did not intend by Title VII however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of any minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications."

In Hughes v. Superior Court of California, 339 U.S. 460, Mr. Justice Frankfurter noting that picketing in support of the imposition of a quota system could be banned stated:

> "To deny to California the right to ban picketers in the circumstances of this case would mean that there can be no prohibition of the pressure of picketing to secure promotional employment on ancestorial grounds as Hungarians in Cleveland, of Poles in Buffalo, or Germans in Milwaukee, Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gambit of racial and religious concentrations in various cities." (339 U.S. at page 454-64)

In a recent case Franks v. Bowman Transportation Company, 495 F. 2d 398 (5th Cir. 1974), a theory of relief similar to that which was allowed by the Court below was rejected by the Court of Appeals:

> "In seeking application-date seniority for members of Class III (black applicants who applied for OTR jobs before January 1, 1972) appellants ask us to take a giant step beyond permitting job competition on the basis of company seniority. They ask us to create constructive seniority for applicants who have

> never worked for the company. Granting that the black OTR applicants who were rejected on racial grounds suffered a wrong, we do not believe that Title VII permits the extension of a constructive seniority to them as a remedy." (At p. 417).

In the instant case the Court below has acknowledged that there will be bumping and "super" seniority afforded to minorities, both incumbent employees and individuals who have never worked a day in the industry.

It is respectfully submitted that in view of the legislative history of the Act and the various interpretations given by the Courts of our land that this form of relief should not be permitted.

POINT IV:

The District Court despite the admonition contained in Rios v. Enterprise Associations Steamfitters Local 638, supra, elected to establish twenty-five (25%) percent as a reasonable goal upon the affidavits of the U.S. Attorney.

This figure was accepted despite the fact that the minority employees as well as the non-minority employees had concluded that the minority labor force within the geographical area controlled by the union would be approximately twenty (20%) percent.

The District Court refused to allow expert testimony to be taken. The figures utilized by the government in support of this position are so contrived as to make any true analysis of them impossible. For example, can the City of Mount Vernon serve as an acceptable base when we are considering the entire geographical area of Westchester County. Naturally, since a higher proportion of minority individuals live within that particular city, the

"minority labor force" percentage was increased with respect to the total available work force. Does the government seriously contend that an individual must come from an urban area and not the suburbs in order to be eligible to work in this industry?

The District Court recognized in its opinion (Op. 9) that the geographical area of the union covered parts of Connecticut, New Jersey, Upstate New York and the Greater Metropolitan Area in general. Nevertheless, it refused to accept the labor force statistics for that particular region as controlling to determine what was an appropriate goal. It is respectfully submitted that absent expert testimony the Court below could not conclude that twenty-five (25%) percent was a lawful or reasonable goal with respect to minority employment in this industry.

POINT V:

Larkin, as well as other intervenors in the District Court, was granted permission to intervene in that:

> "The Court has concluded that each group satisfies the requirements of intervention of right, under Fed. R. Civ. P. 24(a)(2), with respect to the narrow question of relief to be granted should the plaintiff prevail after a hearing and/or trial of the main actions. Their job status may very well be at stake here. Such an economic interest is sufficient under the rule. See, Cascade Natural Gas Corp. v. El Paso, 386 U.S. 129 (1967). Cf. Smuch v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969). It is equally clear that the proposed intervenors, situated as they are on the 'Regular Extra' lists, are so situated that the disposition of the actions may of a practical matter impair or impede their ability to protect their interests. Finally, in this court's view, no party could be expected to adequately protect their position on this issue.
>
> "...reason would dictate they each be designated as a party defendant with respect to this issue. But with due consideration for their aversion to such a designation and with due regard for Rocca v. Thompson, 223 U.S. 453, 458 (1912), they will be designated simply as 'intervenors'." (Order of Lawrence W. Pierce, U.S.D.J., dated April 30, 1974)

The designation of Larkin as an intervenor did not change the fact that he was indeed a"party" with respect to the proceedings in the District Court.

It has long been established that the plaintiffs and defendants in a lawsuit may not enter into any agreement which affects the rights of an intervenor. (Ray-Lite Electric Corporation v. Noma Electric Corp.; Otis, Intervenor, 170 F. 2d 914 (2d Cir. 1948)).

In Ray-Lite Electric Corporation, the plaintiff and defendant agreed to entry of a judgment which would have decided certain issues between themselves. The Court noting that Otis, the designator intervenor, was a party in the action and that the proposed agreement affected the "intervenor's" rights stated:

> "A stipulation signed after an intervenor has entered cannot affect his rights, for an intervenor comes into the case in the condition at which it stands at the time of intervention... As relates to the compromise made between plaintiff and defendant terminating the litigation between them: the intervenor having a standing in Court, as we have decided, it follows that no compromise can be entered into between plaintiff and defendant affecting his rights."
>
> "...the right to intervene under Federal Rules of Civil Procedure, Rule 24(b)(2) 28 U.S.C.,presupposes that the intervenor has a right to protect which is not subject to the disposition of the parties already in the case." (Ray-Lite Electric Corp. v. Noma Electric Corp., supra, at page 915)

The District Court denied Larkin's motion in opposition to the settlement of the instant action and agreed to settle the matter despite the decision in Ray-Lite.

It is respectfully submitted that the intervenor in the District Court, Larkin, was entitled to have the Court rule after trial on the merits of the action. The settlement agreement entered into by all of the other parties circumvented this right and prohibited the orderly due process of law in this case.

CONCLUSION:

It is respectfully submitted that the order of the District Court approving the settlement agreement of June 27, 1974, be reversed.

Respectfully submitted,

HERMAN H. TARNOW
Attorney for Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN R. PATTERSON, et al.,

Plaintiffs-Appellees,

- against -

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants-Appellees,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiffs-Appellees,

- against -

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants-Appellees,

DOMINICK VENTRE, FRANK CHILLEMI, GERALD KATZ, et al.,

Intervenors,

JAMES V. LARKIN ,

Intervenor-Appellant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

HERMAN H. TARNOW, being duly sworn, deposes and says, that deponent is over the age of 18 and is not a party to the action and resides at 251 E. 32nd Street, New York, New York

That on the 20th day of November, 1974 the deponent served the within Appellant's Brief upon the following attorneys of record

Jack Greenberg & Deborah M. Green

Michael Targoff
Willkie, Farr & Gallagher

Paul J. Curran
United States Attorney

Michael Devorkin
Assistant U.S. Attorney

Asher, Schwartz, O'Donnell & Schwartz

John Canoni
Townley, Updike, Carter & Rodgers

John Stantion

Sidney Orenstein

Bruce Berry, Sabin, Bermant & Blau

Julius Kass
Bandler & Kass

Joseph Zuckerman
Roseman, Colin, Kaye, Petschek,
Freund & Emil

Stephen Davis and Wilfred L. Davis

Stroock & Stroock & Lavan

Marguerite Filson
Patterson, Belknap & Webb

Wendy Mariner
Satterlee & Stephens

J. Donald Higgins

Fine, Tofel & Saxl

Sidney A. Florea

at the address designated by said attorneys by depositing same by enclosing in a postpaid properly addressed wrapper, in a post office which is the official deposity under the care and exclusiv

custody regularly maintained by the United States Post Office in the State of New York.

HERMAN H. TARNOW

Sworn to before me this
21st day of November, 1974

C. De ROSA
Notary Public, State of New York
No. 41-4514883
Qualified in Queens County
Commission Expires March 30, 1975

notice to all parties, the District Court held a hearing

☐ INDIVIDUAL VERIFICATION

STATE OF NEW YORK, COUNTY OF ss.:

deponent is the , being duly sworn, deposes and says, that in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

☐ CORPORATE VERIFICATION

deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation. Deponent is an ofricer thereof, to-wit, its The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to beforem me, this day of 19 .....

☐ ATTORNEY'S AFFIRMATION

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State; shows, that deponent is the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

☐ CERTIFICATION BY ATTORNEY

certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated: .....

☐ AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in-a post office-official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ AFFIDAVIT OF PERSONAL SERVICE

upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me, this day of 19

.....

MD:jp
73-2558
D86

notice to all parties, the District Court held a hearing

NOTICE OF ENTRY

Sir : PLEASE TAKE NOTICE that the within is a true-certified-copy of a

duly entered in the office of the clerk of the within named court on 19

Dated: 19

Yours, etc.,

HERMAN H. TARNOW

Attorney for

Office and Post Office Address

663 FIFTH AVENUE
NEW YORK, N.Y. 10022

To:

Attorney for

NOTICE OF SETTLEMENT

Sir : PLEASE TAKE NOTICE that

of which the within is a true copy will be presented for settlement to Mr. Justice

one of the Justices of the within named Court at

on the day of 19

at M.

Dated: 19

Yours, etc.,

HERMAN H. TARNOW

Attorney for

Office and Post Office Address

663 FIFTH AVENUE
NEW YORK, N.Y. 10022

To: Esq.

Attorney for

IN THE UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

JOHN R. PATTERSON, et al.,

Plaintiffs-Appellees,

- against -

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants-Appellees.

AFFIDVAIT OF SERVICE

HERMAN H. TARNOW
Appellant

Attorney for

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663 FIFTH AVENUE
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(212) 355-3977

To: Esq

Attorney for

Service of a copy of the within

is hereby admitted:

Dated, N.Y., 19

Attorney for